

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

V.

SEA COAST TOWING INC., a Washington corporation, d/b/a SEA COAST TOWING OF SEATTLE, MYRON B. KJOS and JANE DOE KJOS, individually and as husband and wife,

No. C03-166Z

## OPINION

## Defendants.

This matter comes before the Court on remand from the Ninth Circuit Court of Appeals by Memorandum of September 6, 2005, Case No. 04-35469. Mandate of USCA, docket no. 131. After reviewing the parties' briefs in support of, and opposition to, the application of the Limitation on Liability Act, 46 U.S.C. app. § 183 (1952 & Supp. 2005), and hearing the argument of counsel on January 27, 2006, the Court enters the following Order.

1           **BACKGROUND**

2           Plaintiff Washington State Department of Transportation (the “State”) brought this  
 3 action to recover damages resulting from a vessel allision. In the early hours of July 29,  
 4 2000, a tugboat operated by Defendant Sea Coast Towing, Inc. (“Sea Coast”) was pushing a  
 5 barge on Lake Washington when the barge struck and damaged a piling supporting the State  
 6 Route 520 bridge (“520 bridge”). Finding of Fact (“FOF”) 9, docket no. 98. The State  
 7 owns, operates and maintains the 520 bridge. Id. at 8. The State brought claims against Sea  
 8 Coast in this Court for negligence, gross negligence, and trespass. Docket no. 1. The case  
 9 concluded with a bench trial in which the principal issues were whether the captain of the  
 10 vessel, Myron Kjos, was negligent in falling asleep at the helm and whether Captain Kjos  
 11 was negligent in violating regulations prohibiting individuals from working more than 12  
 12 hours in a 24-hour period. See 46 U.S.C. § 8104(h); 46 C.F.R. § 15.705(d); Conclusions of  
 13 Law (“COL”), docket no. 98.

14           After trial, the Court concluded that Captain Kjos was negligent in maintaining a  
 15 proper watch, which violated Rule 5 of the International Regulations for Prevention of  
 16 Collisions at Sea, 33 U.S.C. § 1602. COL 8. The Court further concluded that Captain  
 17 Kjos’ negligence in failing to maintain a proper lookout was the sole proximate cause of the  
 18 allision. COL 10. Under the Limitation of Liability Act, 46 U.S.C. App. § 183, the Court  
 19 then shifted the burden to Sea Coast to demonstrate that it had no privity of actual or  
 20 constructive knowledge as to the cause of the allision. COL 9-10. Examining the relevant  
 21 case law, the Court concluded that Sea Coast did not have knowledge of Captain Kjos’  
 22 failure to maintain a proper lookout because Sea Coast demonstrated that Captain Kjos was  
 23 competent. COL 12-14. Thus, Sea Coast was entitled to limit its liability for the allision to  
 24 the value of the vessel (\$105,000).

25           The Court found that the State did not prove by a preponderance of the evidence that  
 26 Captain Kjos violated the 12-hour limitation. FOF 27. The Court relied on the testimony of

1 Captain Kjos and the vessel work logs, which it found were poorly kept. FOF 28. While the  
 2 Court concluded that Sea Coast was negligent in issuing a company policy at odds with the  
 3 12-hour work limitation and failing to adequately maintain its logs, the Court also concluded  
 4 that the State failed to prove that this negligence was a proximate cause of the allision. COL  
 5 11. Because there was no 12-hour violation, the burden did not shift to Sea Coast to show  
 6 that it lacked knowledge of such a 12-hour violation. COL 11-12.

7 On September 6, 2005, the Ninth Circuit entered a Memorandum remanding the case  
 8 back to this Court to further address the 12-hour work limitation. Docket no. 137-3. Citing  
 9 several of the same cases relied upon by this Court in its Conclusions of Law, the Ninth  
 10 Circuit's Memorandum appears to adopt the same underlying principles of burden shifting  
 11 under the Limitation of Liability Act. Mem. at 2-3. However, the Ninth Circuit held that  
 12 this Court erred in applying the burden shifting at trial.

13 **DISCUSSION**

14 The Ninth Circuit's Memorandum first acknowledges the general rule that a claimant  
 15 has the burden of establishing the specific negligent act that caused the harm before the  
 16 burden shifts to the defendant under the Limitation of Liability Act. Id. (citing In re Bowfin  
 17 M/V, 339 F.3d 1137, 1138 (9th Cir. 2003)). The Memorandum also noted that the reason for  
 18 placing the initial burden on the claimant is to prevent the defendant from being forced into  
 19 speculating as to which of many potential causes it must rebut after the burden shifts.  
 20 Finally, stating that “the only disputed factual contention...was the *possibility* that [Captain  
 21 Kjos] had worked in excess of 12 hours,” the Ninth Circuit reasoned that the burden shifts to  
 22 Sea Coast because Sea Coast was not required to speculate as to the alleged negligence. Id.  
 23 at 4 (emphasis added). The Memorandum concluded: “[T]he only disputed factual  
 24 contention was whether Sea Coast was neither privy to nor had knowledge of any violation  
 25 by Kjos of the 12-hour work limitation. Sea Coast was not entitled to limit its liability  
 26 without first satisfying *this burden of proofId. at 6 (emphasis added). Thus, as this Court*

1 interprets the Memorandum, the reference to “this burden of proof” appears to require Sea  
 2 Coast to prove by a preponderance of the evidence (1) that no 12-hour violation occurred in  
 3 the 24 hours preceding the allision and (2), if Sea Coast cannot make such a showing, that it  
 4 lacked privity of knowledge of a 12-hour violation.<sup>1</sup>

5 Sea Coast contends that the same evidence supporting the Court’s finding that the  
 6 State could not establish the existence of a 12-hour violation (FOF 28) is sufficient to prove  
 7 that, in fact, no 12-hour violation occurred. Specifically, Sea Coast relies on the testimony  
 8 of Captain Kjos and his reliance on the daily log entries for July 28 and 29 to aid in his  
 9 memory of the events. In response, the State argues that Captain Kjos’ testimony was  
 10 contradicted by his deposition testimony, not supported by an analysis of the handwriting on  
 11 the log entries, and unhelpful based on his lack of certainty concerning the days preceding  
 12 the day of the allision. The State also argues that the 12-hour violation is not the only issue  
 13 before the Court on remand. The State requests that the Court consider whether Sea Coast’s  
 14 policies and safety procedures were themselves a cause of Captain Kjos falling asleep at the  
 15 helm, regardless of a 12-hour violation.

16 1. Violation of the 12-Hour Limitation

17 The Court determined that, as a factual matter, the State could not prove by a  
 18 preponderance of the evidence that Captain Kjos violated the 12-hour limitation. FOF 28.  
 19 The question now is whether the Court should reach the same result given the shift in burden  
 20 from the State to Sea Coast. Sea Coast argues that the same evidence the Court used to find  
 21 that the State could not establish the existence of a 12-hour violation is sufficient for Sea

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22  
 23 <sup>1</sup> Logically, this new burden shifting scheme appears difficult to apply; if Sea Coast failed  
 24 to prove the *absence* of a 12-hour violation, such a failure would not establish that a violation  
 25 actually occurred. Thus, under the second prong of the analysis, Sea Coast could be required  
 26 to prove that it lacked privity of knowledge as to an event that may or may not have occurred.  
 Presumably, this is why courts have traditionally required claimants to first prove the existence  
 of the negligent act before the burden shifts to the defendant to establish a lack of privity of  
 knowledge as to that act. Nonetheless, the Court need not address this problematic aspect of the  
 issue on remand because, as discussed below, Sea Coast has established the absence of a  
 violation based on the evidence before the Court.

1 Coast to establish the absence of a 12-hour violation. Sea Coast relies primarily on the  
2 testimony of Captain Kjos and the work logs of the vessel for the 24 hours preceding the  
3 allision. At trial, Captain Kjos stated explicitly that he did not work more than 12 hours in  
4 the 24-hour period prior to the allision:

5 THE COURT: Can you tell us in the 24-hour period prior to the accident here that  
6 we're involved with were you on watch more than 12 hours in that 24-hour period,  
7 sir?

8 KJOS: No.  
9 . . .

10 KJOS: No. He asked me that if I – in the previous 24 hours before my accident if I  
11 was on watch more than 12 hours, and I said no.

12 Bitseff Decl., docket no. 136, Ex. A (Kjos Testimony at 38).

13 Furthermore, Captain Kjos was questioned at trial about the critical period in dispute  
14 from Vashon Head at 0745 to Point Defiance at 0935. As the Court previously found, if  
15 Captain Kjos worked during this period, he worked approximately 12.45 to 12.95 hours but,  
16 if he did not work during this period, he worked only 10.65 to 11.15 hours. FOF 28. At  
17 trial, Captain Kjos was asked directly whether he worked during this time period and  
18 responded as follows:

19 QUESTION: 0935 the next entry was Point Defiance...Would you have been on  
20 watch *between* Point Vashon and Point Defiance?

21 KJOS: No.

22 Id. (Kjos Testimony at 92) (emphasis added).

23 The State contends that this testimony was contradicted by Captain Kjos' deposition  
24 testimony, in which the following exchange took place:

25 SLOAN: The next entry is 0745, 7:45 in the morning, of July 28, 2000. It appears to  
26 read "Vashon...Head." Was that your entry?

27 KJOS: It was.

28 SLOAN: And were you on watch then?

29 KJOS: I don't know.

1 Docket no. 137, Ex. 7 (Kjos Dep. at 53-54). The State's reliance on the deposition testimony  
 2 is misplaced. Captain Kjos' uncertain deposition testimony refers only to a specific point in  
 3 time (0745), while his trial testimony speaks to the entire period in dispute (0745 to 0935).  
 4 There is no contradiction.

5 Next, the State argues that Captain Kjos lacked credibility because his testimony that  
 6 one or more of the daily log entries were not his is contradicted by an analysis of the  
 7 handwriting. The State invites the Court to analyze the handwriting on the daily log for July  
 8 28, 2000, and find that the entries for 1120, 1310, and 1540 are in the hand of Captain Kjos.  
 9 The three entries occurred during a time when Captain Kjos testified that he was off-watch.  
 10 While the State makes a compelling argument based on the plain appearance of the  
 11 handwriting, the Court declines to place itself in the position of serving as a handwriting  
 12 expert. Moreover, the testimony at trial was clear in indicating that log entries were not  
 13 necessarily made by the individual on watch at the time. Thus, even if the State were correct  
 14 about the handwriting, it would show only that Captain Kjos was mistaken in testifying that  
 15 the handwriting was not his.<sup>2</sup>

16 Finally, the State relies on several exchanges at trial in which Captain Kjos used the  
 17 word "conjecture" with regard to estimating the number of hours he worked based on the  
 18 daily logs:

19 THE COURT: Is there any way from looking at [the master log] itself to know exactly  
 20 when you worked and when you didn't [on *July 24th*]?

21 KJOS: No, because it isn't – I'm not – where it says – I could put my initials in over  
 22 here, each time these points were logged, there's nobody – nobody's logged any

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24 <sup>2</sup> In FOF 28, the Court stated that "[t]he log entries for both 0745 and 0935 (Exhibit 48)  
 25 on July 29 were in the handwriting of the mate." The parties agree that Captain Kjos testified  
 26 that the log entry for 0745 on July 28, 2000, was in his own handwriting, not that of the mate.  
 Given this clarification, the Court takes this opportunity to amend FOF 28. The Court finds that  
 the log entry for 0935 on July 28, 2000, was in the handwriting of the mate and, per his  
 testimony, the entry for 0745 was in the handwriting of Captain Kjos. This finding does not  
 alter the Court's analysis of the legal issues on remand.

1 points they went by or anything. There's no way to prove. It would be just  
2 conjecture on my part or anybody else's.  
3 . . .

4 SLOAN: Bringing your attention to the master's daily report for *July 25th* of 2000?

5 KJOS: I couldn't tell you. I could try to tell you, but it would be conjecture on my  
6 part.  
7 . . .

8 SLOAN: So from looking at the master's daily report for *July 26*, do you have a way  
9 of calculating the number of hours you worked?

10 KJOS: I could go through it and try for you, but I – I'm pretty – it would be  
11 conjecture on my part.

12 Docket no. 137, Ex. 1 (Kjos Testimony at 23-25) (emphasis added). The State maintains that  
13 these exchanges demonstrate that Captain Kjos was largely uncertain about the number of  
14 hours he worked and, therefore, not a credible witness.

15 The Court declines to give weight to these exchanges in evaluating Captain Kjos'  
16 testimony regarding the 24 hours immediately preceding the allision. Each of the questions  
17 refer to days (July 24, 25, and 26) before the 24 hours preceding the allision (July 28-29),  
18 and none of Captain Kjos' answers involved the careful evaluation of the daily logs he  
undertook for July 28-29. Accordingly, the Court finds these exchanges irrelevant to the  
question of whether Captain Kjos violated the 12-hour limitation in the 24 hours preceding  
the allision.

19 In sum, the evidence regarding the 12-hour issue is minimal and one-sided. At trial,  
20 Captain Kjos offered direct and specific testimony that he was not on watch during the  
21 critical period from 0745 to 0935 on July 28, 2000, and that he did not work more than 12  
22 hours in the 24 hours preceding the allision. This testimony is not contradicted by Captain  
23 Kjos' deposition, the daily logs, or any other meaningful source.<sup>3</sup> Accordingly, the Court

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25 \_\_\_\_\_  
26 <sup>3</sup> The Court recognizes that the State's expert, Cecil Gray, testified at trial that his  
evaluation of the daily logs led to his opinion that Captain Kjos did violate the 12-hour  
limitation. However, the Court previously found that Cecil Gray's testimony was directly  
contradicted by his deposition. FOF 28. The Court will not re-evaluate that finding.

1 finds that Sea Coast has met its burden of proving by a preponderance of the evidence that  
2 Captain Kjos did not violate the 12-hour work limitation in the 24 hours preceding the  
3 allision.

4       2. Privity of Knowledge

5       Because the Court finds that Sea Coast has proved the absence of a 12-hour violation  
6 by a preponderance of the evidence, the Court need not determine whether Sea Coast had  
7 privity of actual or constructive knowledge. There can be no knowledge of an event that did  
8 not occur.

9       3. Other Issues on Remand

10       In its brief and argument before the Court, the State suggests that the issues on remand  
11 are not limited to questions of whether a 12-hour violation occurred and, if a violation  
12 occurred, whether Sea Coast had privity of knowledge of such a violation. The State  
13 contends that this Court should also revisit its conclusion that Sea Coast did not have privity  
14 of knowledge of Captain Kjos having fallen asleep on watch. State's Br. at 19-21.  
15 Specifically, the State asks the Court to conclude that Sea Coast's record-keeping procedures  
16 and employee surveys placed Sea Coast on notice that fatigue was a problem likely to result  
17 in crewmen falling asleep on watch.

18       The Court declines to address this argument for two reasons. First, the Court  
19 previously concluded that Captain Kjos' negligence in falling asleep was the *sole* proximate  
20 cause of the allision and that Sea Coast did not have privity of knowledge as to that  
21 negligence. COL 10, 13-15. The Court also concluded that Sea Coast's misinterpretation of  
22 Coast Guard regulations and poor log-keeping practices were not causes of the allision. COL  
23 11. The Court has resolved the issues the State now seeks to raise. Second, the Ninth  
24 Circuit's Memorandum does not instruct the Court to re-examine these conclusions. The  
25 Memorandum speaks only to the 12-hour violation issue.

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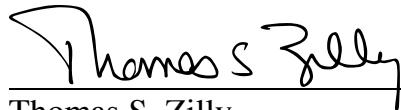
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2 **CONCLUSION**

3 The only direct evidence regarding the 12-hour violation claim was provided by  
4 Captain Kjos, who testified that he did not work more than 12 hours in the 24 hours  
5 preceding the allision of July 29, 2000. Captain Kjos also testified that he did not work  
6 between 0745 and 0935 on July 28, 2000. Captain Kjos' testimony was not contradicted by  
7 his deposition, the daily log entries, or Captain Kjos' trial testimony concerning July 24, 25,  
8 and 26. Based on this evidence, the Court finds that Sea Coast proved the absence of a 12-  
9 hour violation by a preponderance of the evidence. Therefore, Sea Coast is entitled to limit  
10 its liability subject to the Limitation of Liability Act, 46 U.S.C. app. § 183 (1952 & Supp.  
11 2005).

12 IT IS SO ORDERED.

13 DATED this 28th day of February, 2006.

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15   
16 Thomas S. Zilly  
17 United States District Judge

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